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SPECIAL FEATURE

GIVING UP THE "I": HOW THE NATIONAL MUSEUM OF THE AMERICAN INDIAN APPROPRIATED TRIBAL VOICES

Whitney Kerr*

I. Introduction

On September 21, 2004, the doors of the new National Museum of the American Indian opened to the public. The completed structure took over twenty years of planning, collaborating, developing, fund-raising, and building. Before the museum even opened, however, questions began to arise about the rhetorical messages surrounding the museum. Many critics allege that the museum ignores many tribal problems and government abuses. Supporters praise the museum for its positive portrayal of American Indians, and are thrilled that the museum provides an outlet for tribal vocalizations.

Though federal policy is in an era of self-determination for American Indian tribes, many have questioned whether the trend toward self-determination will continue in the future, how broad the power of self-determination truly is, and whether self-determination has actually benefitted American Indian tribes. In the past, the federal government assumed the ability to control many aspects of tribal life and power.¹ The government's ability to assume control has been reaffirmed countless times by the Supreme

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1. The federal government has exercised its powers over American Indian tribes in a variety of ways over the past two hundred years. The federal government signed numerous treaties with different tribes providing for removal of the tribes from their traditional lands during the mid-1800s, passed statutes allotting various tribal lands from the late 1800s through the early 1900s, and even pursued the termination of American Indian tribes in the mid-1900s. The makeup of tribal power structures and social programs often depended on what policy course the federal government was pursuing at the time. See DAVID H. GETCHES ET AL., *FEDERAL INDIAN LAW* 223-24, 687-92, 709-14 (4th ed. 1998). See generally 25 C.F.R. pt. 83 (1997) (requirements for federal recognition of an American Indian tribe); 28 U.S.C. § 1360(a) (2000) (civil jurisdiction over American Indian tribes given to states in some circumstances; part of the Public Law 280 legislation); 25 U.S.C. § 415(a) (2000) (Leasing of tribal lands); 25 U.S.C. §§ 405-407 (2000) (governing reservation timber sales; Secretary of the Interior has broad authority); Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (2000) (mandating that some "constitutional" rights be provided by tribes).

Court of the United States.² Over the past two hundred years, the federal government has sometimes used its power to the benefit and sometimes to the detriment of American Indian tribes. The uniting theme of the federal government's Indian policy is that the government should determine what is "best" for tribes. In determining what is best for the tribes, the government utilizes the power to define which political entities are tribes and who may be American Indians.

During the 1950s and 1960s, civil rights movements helped change public attitudes and perceptions in regards to racial minorities. The change in public attitudes and perceptions helped change the law in regard to minorities. Minority groups began to gain some political power, enough that overall social change began to occur. One important concept that arose out of the civil rights movements was the idea that true power included the right of racial minorities to identify and define themselves. Minorities only gained their own power by speaking for themselves, not by being spoken of and about by others.

The civil rights movements of the 1950s and 1960s affected federal Indian policy. In 1970, President Richard Nixon announced a shift in federal policy, from an era of termination and assimilation into an era of self-determination.³ The self-determination era was supposed to be different from other eras in the federal government's Indian policy. The policy goal was supposed to shift from forced tribal assimilation to tribal freedom to determine the appropriate paths for the present and the future. Under the theories of power that emerged from the civil rights movement, the most essential power that should have been transferred to tribes was the ability to define and identify themselves.

The essential question surrounding the opening of the National Museum of the American Indian is whether the museum represents a chance for tribes to define themselves and their history, or whether it is merely another form of

2. See generally *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *United States v. Kagama*, 118 U.S. 375 (1886); *United States v. Sandoval*, 231 U.S. 28 (1913); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *Sioux Tribe v. United States*, 316 U.S. 317 (1942). The power to assume control is not without financial limitations, though. See *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 115-16 (1938) (federal government must compensate tribes for the taking of any tribal property interests). See generally *Seminole Nation v. United States*, 316 U.S. 286 (1942) (federal government has enforceable fiduciary duties to tribal members); *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980) (considering standards and tests to be used in weighing the legal correctness of actions by the federal government in regards to its fiduciary duties to tribes).

3. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING RECOMMENDATIONS FOR INDIAN POLICY, H.R. DOC. NO. 91-363 (1970).

government definition of who and what a tribe is. To answer this question, this note will analyze the government's power to define tribal sovereignty and control tribal life, the rhetorical messages the government sends through its laws and policies, and how the museum fits with federal law and policy.

II. The Federal Government's Power to Define

The power of tribes to define their own identities and rights has been debated from the moment foreign nations set foot upon the Americas. Some philosophers thought that tribes should be allowed to maintain all of their inherent sovereign rights. Those rights should only be imposed on by foreign governments when it was to the tribe's benefit to do so.⁴ Other philosophers and politicians did not recognize the pre-colonial inhabitants of the Americas as even being full human beings.⁵ One popular way of rationalizing a conquering nation's imposition of power over the tribes was to use Aristotle's natural slave theory, which said that from birth, some men were marked for leadership and others were marked for subjugation.⁶ The trustee concept eventually won out, partly because of the philosophies of John Locke and Jean-Jacques Rousseau, and became an internationally favored ideal.⁷

The language used by Justice Marshall in *Cherokee Nation v. Georgia*⁸ helped establish much of the federal government's power to define American Indian tribes. Marshall described tribes as domestic dependent nations that relied on the federal government for support and protection.⁹ Tribes could not truly be considered "foreign nations"¹⁰ since they were subject to the power and tutelage of the United States.¹¹ By characterizing tribes as dependent, Marshall opened the door to rhetoric and policy that characterized tribes as having only what power the federal government chose to give them. Tribes had no freedom to choose their own paths. Instead, they were forced to walk whatever trails the federal government mapped out for them.

Perhaps realizing the dangerous road his rhetoric had placed the tribal-governmental relationship on, Marshall tried to clarify tribal power in

4. JAMES E. FALKOWSKI, INDIAN LAW/RACE LAW 23 (1992) (quoting Francisco de Victoria).

5. *Id.* at 27.

6. *Id.* at 26.

7. *Id.* at 34.

8. 30 U.S. (5 Pet.) 1 (1831).

9. *Id.* at 17.

10. *Id.*

11. *Id.*

Worcester v. Georgia.¹² In *Worcester*, Marshall said that the crown (hearkening back to the discovery doctrines enumerated in *Johnson v. McIntosh*¹³) had purchased the "alliance and dependence" of the tribes but had not "intruded into the interior of their affairs" or "interfered with their self-government."¹⁴ The use of the word "give" in the Treaty of Hopewell did not really mean that the federal government had "given" tribes sovereignty.¹⁵ Tribes had not given up their right to govern themselves nor had they abandoned their rights to maintain their own cultural identity.¹⁶

However, tribes were severely limited in the exercise of their inherent power. In *Lone Wolf v. Hitchcock*,¹⁷ the Supreme Court held that the federal government was free to abrogate treaties if it chose to do so.¹⁸ The Supreme Court indicated that it would automatically presume that the federal government had acted in good faith in regards to American Indian tribes.¹⁹ *Lone Wolf* was later limited in *United States v. Sioux Nation of Indians*²⁰ to require just compensation for any treaty rights abrogated by Congress.²¹ Tribes were also limited in their exercise of judicial authority over non-members.²² The Supreme Court has occasionally been criticized for creating mythology surrounding federal Indian policies in order to justify the results it wants to reach.²³

In the hands of the federal government, tribes have lost their claims to individuality. In between attempts at obliteration, the federal government has shown a tendency to homogenize tribal culture. The majority of federal Indian policies are implemented uniformly without regard to tribal differences. There are vast differences between tribes, and ignoring those differences can

12. 31 U.S. (6 Pet.) 515 (1832).

13. 21 U.S. (8 Wheat.) 543 (1823).

14. *Worcester*, 31 U.S. (6 Pet.) at 517.

15. *Id.* at 518.

16. *Id.*

17. 187 U.S. 553 (1903).

18. *Id.* at 566.

19. *Id.* at 568.

20. 448 U.S. 371 (1980).

21. *Id.*

22. See *Montana v. United States*, 450 U.S. 544 (1981) (civil jurisdiction); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (criminal jurisdiction); *Duro v. Reina*, 495 U.S. 676 (1990) (non-member American Indians; later limited by Congress in 25 U.S.C. § 1301(2) (1994); upheld in *United States v. Lara*, 541 U.S. 193 (2004)).

23. FALKOWSKI, *supra* note 4, at 107; see also *United States v. Lara*, 541 U.S. 193 (2004); *United States v. Kagama*, 118 U.S. 375 (1886) (creation of an extra-constitutional source of congressional power over tribes).

cause devastating results.²⁴ The federal government's definition of an "Indian" changes depending on the goal of the policy. The federal government's only real requirement to be considered an "Indian" when it wants to bring a tribe under its power seems to revolve around whether the people "are essentially a simple, uninformed and inferior people."²⁵ If the tribe is trying to receive governmental benefits, the burden of proving a tribe is "Indian" can be much higher.²⁶

One example of the double-edged sword that can result from allowing the federal government to legislate for and define American Indian tribes can be found in *Morton v. Mancari*.²⁷ In *Morton*, the Supreme Court held that the racial structuring preferences favoring American Indians used by the Bureau of Indian Affairs did not violate the Due Process Clause of the Fifth Amendment to the United States Constitution.²⁸ Though the decision benefitted American Indians in the circumstance at hand, the Supreme Court held that the hiring preference was not granted to American Indians because of their race.²⁹ Instead, the preference was granted to American Indians as a political entity.³⁰ While the decision recognized that different American Indian tribes were not necessarily culturally, socially, or even genetically identical entities, the decision also opened the door to using rational basis review for Congressional actions affecting American Indians.³¹ Rational basis review makes American Indians even more vulnerable to federal government actions adversely affecting tribal interests. In the wake of *Morton*, the federal government has more power to define American Indians than ever.

III. Rhetorical Messages From the Government

The federal government uses its power over American Indian tribes in various ways, creating policies and laws that sometimes benefit and sometimes harm tribal interests. Government actions send a rhetorical message that subtly influences society and future politicians. Political

24. See Stephen Cornell, *Sovereignty, Prosperity and Policy in Indian Country Today*, 5 COMMUNITY REINVESTMENT 5, 5-7, 9-13 (1997), reprinted in DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW: CASES AND MATERIALS (4th ed. 1998).

25. United States v. Sandoval, 231 U.S. 28, 39 (1913).

26. See 25 C.F.R. pt. 83 (1997).

27. Morton v. Mancari, 417 U.S. 535, 555 (1974).

28. *Id.* at 553.

29. *Id.* at 553-54.

30. *Id.* at 554.

31. *Id.* at 554-55.

language creates and becomes the political reality.³² Language provides meaning that shapes the future.³³ One unifying theme in the government's rhetoric surrounding tribes is that the government values the cultures of the tribes, while ignoring the people and their problems.³⁴ The government's language use is strategic; it is used to create an aura of rationality behind government actions.³⁵

One technique is to blame the tribes for all of the problems that exist in tribal society, without any consideration of the tribe's status as victims of prior government actions.³⁶ If tribes are responsible for their own problems, the federal government can adopt a position of superiority when taking action to solve tribal problems. The flaw in the federal government's policy is that American Indians are not allowed to fix their own problems; the federal government is so eager to help "solve" the problem for the tribe that the tribe is not allowed develop their own problem-solving processes.³⁷ As long as the tribes are not allowed to solve their own problems, the tribes remain unable to defend themselves.³⁸ Tribes remain victims in waiting, and the federal government uses the tribe's victim status as a tool to continue federal control over tribal futures.

Federal usurpation of control seems contrary to the idea of self-determination, but the practice has continued into the self-determination era. The messages below still exist in the current era of self-determination. Such messages help rationalize the federal government's need to determine the future of American Indian tribes.³⁹ The era of self-determination will be self-defeating unless and until the federal government recognizes that tribes have the inherent right to solve their own problems and that the federal government should not interfere with the tribes' sovereign power to do so.⁴⁰

A. The Tribal Sovereignty as A Gift Doctrine

One of the most prevailing myths surrounding American Indians is that the federal government somehow gave tribes their sovereignty. The motives of

32. MURRAY EDELMAN, *CONSTRUCTING THE POLITICAL SPECTACLE* 104 (1988).

33. *Id.* at 105.

34. Rosemary J. Coombe, *The Properties of Culture and the Possession of Identity: Postcolonial Struggle and the Legal Imagination*, in *BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION* 88 (Bruce Ziff & Pratima V. Rao eds., 1997).

35. EDELMAN, *supra* note 32, at 108-09.

36. *See generally id.* at 79.

37. S. LYMAN TYLER, *U.S. DEP'T OF INTERIOR, HISTORY OF INDIAN POLICY* 279 (1973).

38. *Id.*

39. *See* EDELMAN, *supra* note 32, at 104-05.

40. *See* Coombe, *supra* note 34.

government leaders in doing so is somewhat unclear; perhaps tribal sovereignty arose out of the goodness of the founding fathers' hearts or perhaps because it was more politically expedient. The reality of the situation is quite different, at least as indicated by judicial opinions of the United States Supreme Court. Tribes have inherent sovereignty that can only be limited or taken away by the federal government.⁴¹ Instead of being the giver, the federal government is the taker.

Confusion over tribal sovereignty as granted or inherent persists into the modern era. President George W. Bush has made verbal gaffes relating to tribal sovereignty. At one press conference, he indicated that sovereignty had been "given" to the tribes.⁴² Overall, treatment of American Indian tribes during President Bush's administration has been mixed in tone. President Bush attended the festivities surrounding the opening of the new National Museum of the American Indian in Washington D.C. and made several speeches that included comments respecting tribal sovereignty.⁴³ Bush indicated that the museum would be a reminder of the "spirit and vitality of peoples native to the nation."⁴⁴ Bush also stated that "the sun is rising on Indian Country" and that tribes and the federal government would continue to work together to achieve common goals.⁴⁵

In addition, President Bush recently signed an executive order mandating that all federal agencies and employees respect tribal sovereignty and strive to work with tribes on all policies.⁴⁶ The administration has pledged to work with tribes as governments with inherent powers.⁴⁷ Such pledges are considered a "diplomatic tradition" for all presidents since the Nixon administration,⁴⁸ but the message was well received by tribal leaders.⁴⁹ One CEO of the Mashantucket Pequot Tribe, John Guevremont, commented that

41. *United States v. Winans*, 198 U.S. 371 (1905).

42. Jerry Reynolds, *Analysis: Bush Sovereignty Pledge Welcome but Follows Western Shoshone Dispossession*, INDIAN COUNTRY TODAY, Sept. 27, 2004, available at <http://www.indiancountry.com/content.cfm?id=1096295890>.

43. Staff Reports, *President Bush Reaffirms Tribal Sovereignty*, INDIAN COUNTRY TODAY, Sept. 24, 2004, available at <http://www.indiancountry.com/content.cfm?id=1096031251>.

44. Associated Press, *Bush Celebrates American Indian Museum*, (Sept. 23, 2004), available at <http://www.msnbc.msn.com/id/6080730/>.

45. *Id.*

46. See Reynolds, *supra* note 42; White House, *President Honors the National Museum of the American Indian* (Sept. 23, 2004), available at <http://www.whitehouse.gov/news/releases/2004/09/20040923-2.html>.

47. *Id.*

48. Reynolds, *supra* note 42; Staff Reports, *supra* note 43.

49. Staff Reports, *supra* note 43.

he hoped the President's remarks indicated that the federal government and tribes were progressing towards a "cooperative relationship."⁵⁰

However, President Bush has also been criticized for his actions towards tribes. Besides making verbal gaffes, some tribes have faced greater challenges from the Bush Administration than they had under other presidential administrations. During his administration, President Bush signed legislation that was meant to dispossess Shoshone tribal lands that were rich in minerals.⁵¹ More cynical members of both tribes and society believe that the close proximity of the 2004 presidential election may have been an element in Bush's positive rhetoric regarding tribes.⁵²

B. The Two-Thirds of a Person or Not A Person At All Doctrine

Governmental abuse of American Indians is not entirely a relic of the past. The U.S. Commission on Civil Rights recently received reports citing rampant evidence of abuse inflicted on American Indians by agents of the United States Border Patrol.⁵³ A general "climate of oppression" seems to hang over tribal lands in and around Arizona.⁵⁴ Many tribal members are prohibited from freely passing across national borders that run through tribal lands, meaning that some spiritual journeys and ceremonies are completely unavailable.⁵⁵ Tribal members are frequently stopped, searched, and threatened with deportation.⁵⁶ These abuses are described as violating civil and religious rights of the different tribes.⁵⁷ When tribal members complain of the abuses, they find themselves targets of more abuse.⁵⁸

One way to change the rhetoric surrounding tribes is to rename the tribe. Self-naming or self-describing by the tribe is an important step to changing the way society views tribes. The term "Indian"⁵⁹ has been used throughout the history of the United States. In the 1960s, the term applied to American

50. *Id.*

51. Reynolds, *supra* note 42.

52. *Id.*

53. Brenda Norrell, *Civil Rights Commission Hears Indigenous Peoples at Border*, INDIAN COUNTRY TODAY, Sept. 24, 2004, available at <http://www.indiancountry.com/content.cfm?id=1096045561>.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. Other, more offensive terms have been used to describe American Indians, but in the interests of space and avoiding sidetracking, this paper will only discuss the most prominently used term.

Indians changed to "Native American."⁶⁰ Changing the name applied to any social or cultural group can be an important step in modifying racial/cultural relationships and outlooks because it is a symbolic rejection of all of the stereotypes the earlier name connotes. African-American/Black groups had a great deal of success using this rhetorical tool in the 1950s through the 1970s. The term "Native American," when used by the Bureau of Indian Affairs includes other native groups from Hawaii and the Pacific Islands, and some tribes reject the term as not being truly indicative of the cultural/racial status of American Indian tribes.⁶¹ Hence, the preferred term of choice by some tribes is "American Indian."

C. The Father Knows Best Doctrine

American Indian tribes still face many social problems. Many tribes struggle with extreme poverty, inadequate educational systems, substance abuse, and high unemployment.⁶² In addition, many American Indians face living conditions that are unconscionable by the standards of mainstream society.⁶³ These and other social problems are blamed for causing other problems, including a high suicide rate.⁶⁴ Suicide is referred to as "a silent epidemic in native communities."⁶⁵

Indian prisons constitute another problematic area tribes must face. U.S. government officials have referred to Indian prisons as "a national disgrace," citing numerous deaths, escapes, or attempted suicides.⁶⁶ Earl Devaney, Inspector General of the Interior Department, recently made a report, released on the same day as the opening of the National Museum of the American Indian, to the Senate Finance Committee of the results from the department's long investigation of the prisons.⁶⁷ Many of the jails are extremely overcrowded with mixed populations of youths and adults.⁶⁸ Broken facilities

60. EDSITEment, *Native American Cultures Across the U.S.* (visited Sept. 30, 2004), at http://edsitement.neh.gov/view_lesson_plan.asp?id=347.

61. *Id.*

62. Darrell Bowling, *Indian Museum Raises "Mixed Emotions"*, MSNBC (Sept. 28, 2004), at <http://www.msnbc.msn.com/id/6100669/>.

63. *Id.*

64. *Id.*

65. *Id.*

66. Associated Press, *Indian Prisons Called 'National Disgrace'* (Sept. 21, 2004), available at <http://www.msnbc.msn.com/id/6065154/>.

67. *Id.*

68. *Id.*

and inadequate staff with little training lead to increased violence among prisoners and on prison officials.⁶⁹

Devaney indicated that he did not believe that problems were attributable solely to a lack of money.⁷⁰ The yearly budget allocated to the Bureau of Indian Affairs for law enforcement, including detention facilities, has almost doubled over the last five years.⁷¹ One senator cited the static nature of bureaucracy as one cause of prison failure.⁷² By not implementing change, the government is failing to meet its responsibilities, causing American Indian prisoners to suffer conditions worse than "those in Third World countries."⁷³ Such a failure reflects poorly upon the United States government, discrediting government rhetoric about the importance of human rights.⁷⁴

Tribal gaming is another area increasingly coming under fire. In Oklahoma, the Cheyenne and Arapaho tribes are embroiled in controversy over the allocation of ten million dollars in gaming profits spent each year by the tribes' business committee.⁷⁵ Composed of eight members, the business committee is supposed to use the money for economic development and emergency assistance for tribal members.⁷⁶ However, testimony from those involved with or on the committee indicates that the money was not being spent properly.⁷⁷ One woman admitted that two members of the business committee used emergency assistance funds to buy two blanket coats for their own personal use.⁷⁸ A former business committee chairman, Robert Tabor, stated that many of the business committee members wanted to use all of the funds for their own personal use.⁷⁹ There are also rumors in the tribal communities that tribal representatives have used the money to take personal vacations and buy new vehicles.⁸⁰

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. Ron Jackson & Tony Thornton, *Cheyenne-Arapaho Officials Hope to Turn Casino Bane to Boon*, OKLAHOMAN, May 11, 2004, at 1A, 14A.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. Ron Jackson, *Questions Surround Use of Tribe's Emergency Fund*, OKLAHOMAN, May 10, 2004, at 3A.

Misuse of the gaming profits is especially troubling because the tribes owe more than \$1.4 million in debt.⁸¹ The Cheyenne and Arapaho tribes owe approximately \$300,000 in funeral home debts;⁸² many of the funeral homes in the area have begun refusing to provide burial services to tribal members without payment in advance.⁸³ It seems to make a difference who is requesting tribal funding or services.⁸⁴ Some tribal members say they have been refused tribal help and support because they have criticized the current officials.⁸⁵ Others will not speak openly about the abuses at all for fear of retribution.⁸⁶

One proposed solution is to enact a "gaming allocation plan."⁸⁷ Under such a measure, spending of the gaming profits would be distributed according to a set distribution plan.⁸⁸ The business committee retained the gaming allocation plan for two years before voting to send it to the Bureau of Indian Affairs.⁸⁹ The plan is currently awaiting BIA action. Before any action may be taken to curtail profit allocation abuse, officials within the BIA must approve the plan.⁹⁰ If the BIA approves the plan, tribal officials can then try to implement the plan.⁹¹

D. The "Why Do American Indians Get Extra?" Doctrine

Tribal enterprises face a great deal of criticism. Federal law prohibits tribes from opening casinos outside of tribal reservations or tribal territory.⁹² There are exceptions available, but all requests must be presented to the Secretary

81. Jackson & Thornton, *supra* note 75.

82. Tony Thornton, *Tribes' Funeral Bills Bring Dispute*, OKLAHOMAN, May 10, 2004, at 1A, 3A (stating that a 2001 resolution by the tribal council allocated \$2500 for each tribal member's burial costs, to be paid from casino profits).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. Jackson & Thornton, *supra* note 72.

88. *Id.* The plan provided that 20% of the profits would be equally divided amongst eligible members of the tribe, 30% would be spent to create economic development, 16% would be used to care for tribal elders, 10% would be distributed to the education fund, 10% would be used for emergency assistance, 5% would go to pay for tribal funerals, 5% would be used to preserve the heritage and culture of the tribes, 2% would be used for elections, and 2% would be allocated for health. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. Tony Thornton, *State Tribes Make Play to Get Casinos Elsewhere*, OKLAHOMAN, Aug. 16, 2004, at 1A, 2A.

of the Interior Department.⁹³ To date, no requests for a casino located outside the home state of a tribe have been granted.⁹⁴ However, that lack of encouragement has not stopped tribes from trying to open out-of-state casinos.⁹⁵ Land claim cases offer tribes a way to acquire the in-state land needed to allow them to open casinos and other gaming enterprises.⁹⁶ Some of the land claims cases have been criticized as being nothing more than veiled attempts to expand tribal gaming enterprises beyond what is currently allowed by federal gaming laws.⁹⁷ Five Oklahoma tribes currently have federal land claims pending.⁹⁸

One troubling aspect of the land claim cases is that many of the lawsuits are being paid for or supported by wealthy land developers and investors.⁹⁹ If the claims succeed and the casinos are built, backers may receive as much as 30% of the profits generated by the casinos during the first several years of operation.¹⁰⁰ Interior Department Secretary Gale Norton wrote a letter to George Pataki, Governor of New York, discussing her concern that the cases were likely to create claims that were not grounded in truly legitimate claims to land.¹⁰¹ Instead, Norton feared that allowing the claims would foster tribal claiming of lands that were "selected solely based on economic potential."¹⁰² Norton's concerns have led many tribes to hope for and work towards the appointment of a more sympathetic Secretary of the Interior Department.¹⁰³

Some states are working to exploit tribal gaming profits.¹⁰⁴ In Minnesota, Governor Tim Pawlenty announced that he intended to force three tribes to renegotiate profit sharing with the state by threatening the tribes with competition.¹⁰⁵ The current tribal compacts did not have an expiration date and the tribes were not required to share profits with the state.¹⁰⁶ Under a

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. Tom Wanamaker, *Let the Games Begin: A Five-State Roundup of Indian Gaming News*, INDIAN COUNTRY TODAY, Sept. 27, 2004, available at <http://www.indiancountry.com/content.cfm?id=1096314255>.

105. *Id.*

106. *Id.*

proposal for a casino in a similar position as the one the tribes sought to build, the state would receive \$90 million of the profits, the tribes would split \$130 million (approximately \$43 million per tribe), and \$120 million would be used for a state lottery.¹⁰⁷ In Massachusetts, two state legislators publicly support tribal casinos, citing the millions of dollars of profits that are generated by tribal casinos in neighboring states.¹⁰⁸ Some tribes are desperate to accept whatever deals they can get from the state. In Iowa, the Meskwaki tribe would have faced the second shutdown of a casino within a year had a new deal with the state not been approved.¹⁰⁹ With threats of commercial competitions and the willingness of the National Indian Gaming Commission to shut down casinos in the event of tribal disputes, many tribes may be increasingly at the mercy of state demands for a portion of the profits.¹¹⁰

IV. The NMAI's Position Amidst Other Government Rhetorical Messages

A. The Importance of Museum Displays

Historically, exhibits and displays of American Indian artifacts within expositions and museums have been organized according to non-Native ideas of what connotes civilization. The expositions of the 1870s were arranged with the idea of showing human progress throughout each successive step.¹¹¹ The different races of the world were placed into one of four categories: "savagery, barbarism, civilization and enlightenment."¹¹² Technological developments determined each race's placement within the hierarchy of races and human progress.¹¹³ In particular, curators focused on using visual depictions to educate the public about the different grades of civilization.¹¹⁴ Photographs of members of different American Indian tribes were taken and organized to present or illustrate general cultural characteristics.¹¹⁵ However,

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. Barbara Mathe, *Kaleidoscopic Classifications: Redefining Information in a World Cultural Context* (Paper Presented at the 64th IFLA General Conference, Aug. 16-21, 1998), in 33 *INSPEL* 56 (1999), available at <http://www.fh-potsdam.de/~IFLA/INSPEL/99-1matb.pdf>.

112. *Id.*

113. *Id.* at 59.

114. *Id.* at 57.

115. *Id.* Native peoples from around the world were put on display at the expositions and fairs of the day. One anecdote illustrates that not all white peoples accepted the native displays as their due. Samuel Verner, a missionary and amateur anthropologist who had brought an African pygmy (Ota Benga) to be displayed (and who was later displayed in a primate cage at

there is evidence that some of the photographers approached their subjects with less than scholarly concern for the details.¹¹⁶ Some of the photographs taken contained American Indians who had been borrowed from other tribes to help flesh out the pictures, resulting in blurred distinctions between the tribes.¹¹⁷ Collections seemed to illustrate a race of people without national representation and, almost uniformly, without political power.¹¹⁸ In addition, some of the original photographs were retouched and changed. Many photos of American Indians taken at the St. Louis Fair were later retouched and traces of the Fair were removed, making it impossible to tell where the photographs were taken.¹¹⁹

Museum displays are very important to the way American Indians are perceived. Combinations of items, or collections of many different views, form perceptions.¹²⁰ Attempts to systematically observe a culture are based primarily on the collections of items and artifacts one views, particularly when the attempt to observe and form ideals about a culture is confined to the point of view presented by a museum.¹²¹ The arrangement and description of the items and objects within a collection define the knowledge gleaned from the museum exhibits.¹²² Thus, museum curators have a high level of responsibility to carefully evaluate and arrange collections to provide the most accurate representation of a culture that is possible, while remembering that the arrangement of the items will always contain an element of artifice.¹²³

B. Faulty Portrayals of American Indians

One prevalent idea in popular culture is that American Indians are figments of the past; that American Indians do not really exist anymore. Many popular movies have portrayed tribal ways as dying out after the Civil War. Artwork often depicts American Indians as fading into the sunset. As a result,

the New York Zoological Gardens) returned with Ota Benga to the Congo and demonstrated the displays by sitting in a rocking chair, smoking, reading, and listening to music within an enclosure in the village. *Id.* at 58. This would not be the end of native peoples as displays however, evidenced by the U.S. Government's sponsorship of a Philippine Reservation that was, essentially, a theme park. *Id.*

116. *Id.* at 57.

117. *Id.* at 57-58.

118. *Id.* at 58.

119. *Id.* at 59. Some of the photographs are still reprinted in books without any mention of the Fair being made.

120. *Id.* at 54.

121. *Id.*

122. *Id.* at 55.

123. *Id.* at 59.

mainstream Caucasian society has seemingly developed the idea that American Indians are gone from modern society. Attitudes that "Indians are dead" deny tribal members' strength, value and cultural reality.¹²⁴

Too often, academia has portrayed American Indians either as "brutish ignorant savages or as wise, all-knowing spiritual caretakers."¹²⁵ Many museum exhibits of tribal cultures are placed in natural history museums, along with specimens of prehistoric cultures, rocks, animals, and insects.¹²⁶ These stereotypes have often been brought back into museums, leaving American Indians feeling hurt and disenfranchised.¹²⁷ The federal government followed academic tendencies and sent geologists and natural scientists to study tribes and act as Indian Agents.¹²⁸ The implication was clear: Native Americans were less evolved than Caucasian members of modern society.¹²⁹

Mary Magoulick writes:

As long as Native Americans are misunderstood, mis-represented, simply overlooked as a real and persistent part of American culture, and co-opted as an "other" that we must define, we will not treat them fairly, understand our own culture and history, nor will we understand or benefit from the positive aspects of their culture.¹³⁰

The "other" is used as a mechanism for control and oppression.¹³¹ The stronger party in the relationship defines and limits the weaker party's identity and potential.¹³²

The National Museum of the American Indian is representative of a movement to return control over depictions of Native peoples back to tribes and could be an important tool for reeducating mainstream society about the strength and vitality of the tribal community.¹³³ History can be a force that tribes utilize to create and strengthen cultural bonds, as well as a force that can

124. Mary Magoulick, *Indian/White Relations II: Persistent Refashioning* 3, at <http://www.faculty.de.gcsu.edu/~mmagouli/concl.htm> (last accessed on Sept. 15, 2004).

125. *Id.* at 4.

126. *Id.*

127. *Id.* at 5.

128. *Id.*

129. *Id.*

130. *Id.* at 6-7.

131. *Id.* at 7.

132. *Id.*

133. *Id.*

be manipulated for cultural survival.¹³⁴ Tribes can humanize themselves and redefine themselves so that they are no longer viewed as an "other."¹³⁵

C. Criticisms of the NMAI

Underneath all of the celebration surrounding the opening of the National Museum of the American Indian there remains an element of criticism. Many American Indians believe the museum should have put more emphasis on the turbulent history within the governmental/tribal relationship.¹³⁶ Specifically, critics allege that the museum should have contained prominent displays of the abusive, cruel and even terroristic policies that the U.S. government used to deal with tribes.¹³⁷

The lack of any obvious criticism of past governmental treatment of tribes is viewed as an attempt to whitewash the bloody past and effectively act to absolve the federal government of any responsibility for its actions.¹³⁸ Tribes see the U.S. government as trying to embrace tribes that it once attempted to destroy, change, or limit.¹³⁹ Some American Indians think that the museum is the federal government's attempt to reimburse tribes for the suffering the government imposed.¹⁴⁰ Others, more cynical about the federal government's feelings of guilt, see the museum as the beginning of another deal with the devil, and want to know the price the tribes will be asked to pay for the museum.¹⁴¹ Also, the failure to accurately portray the suffering of the different tribes arguably lessens the impact and educational lesson the museum has to offer, and non-native visitors will leave without truly acknowledging the past and realizing the need for caution in the future.¹⁴² The tribal "holocaust" will effectively be covered up.¹⁴³

Another criticism is that the building doesn't address the needs of all the American Indians.¹⁴⁴ Many criticized the museum for ignoring many tribes (primarily poor northern tribes who were unable to contribute much

134. *Id.* at 1 (quoting Raymond D. Fogelson).

135. *Id.* at 7.

136. Carter Camp, *Hiding Genocide: The National Museum of the American Indian*, OKLAHOMA INDIAN TIMES (1999), available at <http://www.aics.org/natlmuseum.html> (last visited Sept. 30, 2004).

137. *Id.* at 2.

138. *Id.*

139. Bowling, *supra* note 62.

140. *Id.*

141. *Id.*

142. Camp, *supra* note 136.

143. *Id.*

144. Bowling, *supra* note 62.

financially to the museum).¹⁴⁵ Questions also remain about where funds collected from gift shops and the museum restaurant will be spent.¹⁴⁶ The questions are viewed as especially troubling in that few mentions are made of the growth of gambling as a revenue-generator.

Funding of the museum is another problem. In 1989, Congress enacted the National Museum of the American Indian Act¹⁴⁷ to authorize development of the new museum. Under the terms of the legislation, Congress authorized the Board of Regents to pay up to two-thirds of the costs of the museum.¹⁴⁸ However, the other one-third of the costs had to be collected and paid from non-governmental sources.¹⁴⁹ There were some concerns that the federal government would not follow through on its promise of funding.¹⁵⁰ In 1995, The Cherokee Observer printed a letter from International Founders Council member James A. Block warning tribal members that Congress was cutting the funds designated for the museum.¹⁵¹

Museum supporters answer that the past is not ignored. The museum presented "highlights" of government treatment of American Indians, including official currency honoring American Indians, and "lowlights", including violated treaties and weapons used against the tribes.¹⁵² President Bush acknowledged the past in a speech delivered to tribal leaders and government officials in the East Room on the opening day of the museum, by saying that the American story, in which American Indians play a central role, "involved great injustice against native peoples, and great contribution by native peoples."¹⁵³ W. Richard West, founding director of the new museum, stated that the museum symbolized "a moment of reconciliation in American

145. *Id.*

146. *Id.*

147. 20 U.S.C. § 80q (2000), available at <http://www.nmnh.si.edu/anthro/repatriation/nmaiact.htm> (as of Jan. 27, 1998).

148. *Id.* § 80q-5(a).

149. *Id.*

150. Letter from James A. Block, International Founders Council member, to Marvin Plunkett, CNO tribal member, posted in CHEROKEE OBSERVER, Sept. 9, 1995, available at <http://nativenet.uthscsa.edu/archive/nl/9509/0061.html>.

151. *Id.*

152. Associated Press, *supra* note 66.

153. White House, *supra* note 46.

history."¹⁵⁴ Other supporters of the museum offer the hope that the museum is the start of a new era of tribal self-government.¹⁵⁵

The central message of the museum is that American Indian tribes are alive and well.¹⁵⁶ Tribes have not, as popular fiction sometimes portrays, faded into the sunset or become only a relic of the past.¹⁵⁷ Tribes continue to survive, even thrive, in the present, and will do so in the future. Tribes are learning to deal with Euro-based ideals and political systems while preserving their own beliefs and cultures.¹⁵⁸ Many everyday items are enhanced in tribal cultures by cultural art.¹⁵⁹ Displays in the museum revise historical events and tell the story from the point of view of the American Indian.¹⁶⁰ The museum design is a symbolic testament to the role of the museum.¹⁶¹ The building was deliberately designed and constructed to stand in marked contrast to the surrounding museums of the Smithsonian.¹⁶² Floyd Flavel, an American Indian actor, said that until now, "for all of our visibility, we have been rendered invisible and silent. This museum is a way of giving us a voice."¹⁶³

D. The Government's Rhetorical Messages Surrounding the NMAI

Legislation surrounding the creation of the museum gives support to Flavel's statements. The National Museum of the American Indian Act and the Amendments explicitly required that the governing body of the museum, the Board of Trustees, have at least 50% of its members be Native American.¹⁶⁴ Tribes were to be involved in the development and planning of the museum.¹⁶⁵ The roles of the tribes was to extend into the operation of the

154. Karen MacPherson, *National Museum of the American Indian a Stunning Showcase of History and Culture*, PITTSBURGH POST-GAZETTE (Sept. 21, 2004), available at <http://www.post-gazette.com/pg/04265/382583.stm>.

155. *Id.*

156. Lauren Monsen, *National Museum of the American Indian Will Open September 21*, WASHINGTON FILE, Sept. 13, 2003, available at <http://usinfo.state.gov/usa/diversity/namuseum/overview.htm>.

157. *Id.*

158. *Id.*

159. *Id.*

160. MacPherson, *supra* note 154.

161. *Id.*

162. Monsen, *supra* note 156; W. Richard West, *The National Museum of the American Indian* (2000), at <http://www.cosmos-club.org/journals/2000/west.html> (last visited Sept. 30, 2004).

163. MacPherson, *supra* note 154.

164. West, *supra* note 162.

165. *Id.*

museum.¹⁶⁶ Museum officials had dozens of consultations with different tribal representatives from the United States, Canada, Central America and South America to better reflect the needs and depictions of the tribes within the museum.¹⁶⁷

Some common themes and messages became clear after the consultations.¹⁶⁸ Native Americans¹⁶⁹ did not want to be viewed as "cultural relics."¹⁷⁰ They wanted to be seen as vibrant and alive in the modern world.¹⁷¹ They also wanted the different programs, exhibitions and presentations to present native cultures from the point of the view of the tribe, instead of running the artifacts through the perceptions of a different culture with different beliefs and value systems.¹⁷² In short, the tribes and museum officials wanted to create a partnership, not just a collaboration,¹⁷³ and to create instead of engaging in objectification of the tribes.¹⁷⁴

Museum officials are also working to bring the museum to many American Indians who are unable to travel to Washington D.C.¹⁷⁵ Richard West, the director of the NMAI, stated that officials were aware that only a small percentage of American Indians would ever see the museum.¹⁷⁶ To allow for more accessibility, a "Fourth Museum" is being developed.¹⁷⁷ The "Fourth Museum" is a collection of electronic information about the exhibits and artifacts owned by the museum that museum officials hope to make available through the Internet and computer software.¹⁷⁸ In addition, the individual tribal communities will be loaned exhibits owned by the museum for public display.¹⁷⁹

166. *Id.*

167. *Id.*

168. *Id.*

169. Since consultations conducted by the museum involved native tribes from both North and South American and were not restricted only to American Indian tribes, I have chosen to use the term "Native American" to reflect the diversity of groups that took part in the planning process.

170. West, *supra* note 162.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. Jerry Reynolds, *NMAI 'Fourth Museum' is in the Making*, INDIAN COUNTRY TODAY, Sept. 27, 2004, available at <http://www.indiancountry.com/content.cfm?id=1096312752>.

176. *Id.*

177. *See id.*

178. *Id.*

179. *Id.*

Museum officials emphasize that the museum represents a change in the relationship between tribes and the federal government.¹⁸⁰ Richard West has argued that the relationship of the past, which has traditionally been filled with animosity and abuse, is steadily improving.¹⁸¹ According to West, American Indians are not subjected to as much "institutionalized discrimination" and feel that "the worst is over."¹⁸² Improved relations between tribes and the federal government are believed to be jump-starting a "cultural renaissance" in tribal communities.¹⁸³

The hope that the relationship is improving seems to be supported by recent statements made by members of the U.S. Congress. Senator Carl Levin released a statement saying that the museum "has taken its rightful place on America's front yard, the National Mall."¹⁸⁴ Representative Nancy Pelosi stated that the museum's opening represented "a new chapter in the story of the American Indian experience" and reflected the renaissance that tribal communities were experiencing.¹⁸⁵ According to Pelosi, there are two aspects of the federal government's relationship with American Indian tribes: "upholding sovereignty and fulfilling [the federal government's] 'trust' responsibilities."¹⁸⁶ Pelosi stressed the idea that tribes must be "full partners" in the formulation of plans for their futures.¹⁸⁷

E. The Rhetorical Problem of the NMAI

The central rhetorical problem behind the NMAI is that tribes are not able to identify themselves or to define their own identities.¹⁸⁸ Congress authorized the museum board to tell the stories and histories of all the different tribes in such a way as to create the cohesive message that is the NMAI. That at least

180. See Ian Fitzgerald, *America's Indian Renaissance — National Museum of the American Indian's Gustav Heye Center*, HIST. TODAY, Nov. 1994, at 4-5. This article discusses the effect of the opening of the Gustav Heye Center in New York (the predecessor to the Smithsonian's NMAI), but the effects of the 1994 opening are probably similar to the NMAI's opening in 2004. *Id.*

181. See *id.*

182. *Id.*

183. *Id.*

184. Press Release, Senator Carl Levin, National Museum of the American Indian (Aug. 30, 2004), available at <http://levin.senate.gov/newsroom/release.cfm?id=225565>.

185. Press Release, Office of Congresswoman Nancy Pelosi, Pelosi Celebrates Opening of the National Museum of the American Indian (Sept. 21, 2004), available at <http://www.house.gov/pelosi/press.html> (select from list).

186. *Id.*

187. *Id.*

188. See Coombe, *supra* note 34, at 86.

50% of the board must be Native American is beside the point; rendering tribes unable to identify themselves by having others define tribal identities essentially creates a cultural appropriation.¹⁸⁹ Cultural appropriation destroys stability of meaning.¹⁹⁰ If the stability of meaning is destroyed, the stability of tribal power is also destroyed.¹⁹¹

The issues surrounding the NMAI are a symptom of a greater cultural problem. The cultures of American Indian tribes are valued, but the people and the problems of the people are essentially ignored.¹⁹² Honoring tribal culture and society through a museum and postage stamps¹⁹³ does send a positive message that the federal government finds some value in tribal life. However, it also sends a negative message that the people and the problems are not worth fixing or fixable when there are no corresponding messages that affect the people themselves. A politician's public proclamation of the need for alliance and cooperation between tribes and the federal government is not recognition of tribal power; it is actually an appropriation of the right of American Indians to speak.¹⁹⁴

Tribes have been robbed of the ability to speak over and over again throughout the history of the government/tribal relationship. Some critics of the federal government's policies have theorized that the United States is uncomfortable with the concept of tribes and tribal sovereignty, that tribes are viewed as being contrary to the notions of democracy on which the federal government prides itself.¹⁹⁵ Whether or not this criticism is true, the federal government and individual politicians have given lip service to the concept of tribal sovereignty. It is time for the federal government to do more than pontificate upon the value of tribal culture and sovereignty and recognize the inherent right of tribes to formulate their own societies and solve their own problems.¹⁹⁶ Before tribes can solve their own problems and maintain their

189. See generally *id.*

190. Jonathan Hart, *Translating and Resisting Empire: Cultural Appropriation and Postcolonial Studies*, in BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION 154 (Bruce Ziff & Pratima V. Rao eds., 1997).

191. *Id.*

192. Coombe, *supra* note 34, at 86.

193. The U.S. Postal Service released stamps honoring the culture of American Indian tribes in 2004. U.S. POSTAL SERV., 2004 COMMEMORATIVE STAMP YEARBOOK 47-48 (2004).

194. Deborah Root, "White Indians": *Appropriation and the Politics of Display*, in BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION 231 (Bruce Ziff & Pratima V. Rao eds., 1997).

195. ELIZABETH COOK-LYNN, *ANTI-INDIANISM IN MODERN AMERICA: A VOICE FROM TATEKEYA'S EARTH* 154 (2001).

196. Tyler, *supra* note 37, at 279.

own cultures, they must have an identity.¹⁹⁷ To gain an identity, tribes must be allowed to speak for themselves.¹⁹⁸ They must be allowed to tell their own stories and their own histories without filtering their messages through a governmental museum. Only then will the United States truly be in an era of self-determination.

V. Conclusion

The rhetorical messages surrounding the opening of the new National Museum of the American Indian are open to interpretation. However, there are strong indications that the federal government still fails to recognize the differences between tribes. Until the federal government recognizes that tribes should not be treated *en masse* and determines that the more appropriate course for government policy is to treat tribes more individually, allowing the tribes to speak for themselves and to come up with their own programs that recognize and allow for the individualized nature of the tribe's society, the government will fail in any policy of self-determination. Congress may have provided that more than 50% of the governing board of the NMAI must be "Native American," but the overall message sent by government policies is that tribes must be dealt with cohesively and are subordinate to the whims of the federal government. By examining the federal government's power to define both the identities of and the policies around American Indian tribes, looking at the government's current rhetorical messages in relation to tribal power, and at the rhetorical messages of the NMAI itself, this note has come to the conclusion that the new National Museum of the American Indian remains another form of government definition of the rights and powers of American Indian tribes. The tribes were not allowed to speak for themselves. Instead, they were allowed to give their message to a museum that told the collective history of the American Indians. The door of the NMAI has been opened, but the power of tribes to tell their own history remains shuttered away in the dark.

197. Coombe, *supra* note 34, at 86-87.

198. See generally Hart, *supra* note 190, at 154-57.